

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JORGE GONZALEZ,

Plaintiff,

v.

OPINION AND ORDER

13-cv-702-wmc

SGT. KUSSMAUL, DR. HOEM, C.O.
BARR, DR. AMARANTE, and BOB
VICKERY.

Defendants.

In this proposed civil action, plaintiff Jorge Gonzalez alleges defendants (1) violated his First Amendment rights by restricting his use of the telephone and (2) violated his Eighth Amendment rights by acting with deliberately indifference to his serious mental health needs. Gonzalez seeks leave to proceed under the *in forma pauperis* statute, 28 U.S.C. § 1915, and from the financial affidavit Gonzalez has provided, the court is satisfied that he is unable to prepay the full fee for filing this lawsuit. Since Gonzalez is incarcerated and has made the necessary initial, partial payment of \$33.00 required of him under § 1915(b)(1), the court's remaining obligation under the Prison Litigation Reform Act ("PLRA") is to screen his complaint and dismiss any portion that is (1) frivolous or malicious; (2) fails to state a claim on which relief may be granted; or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915A. Because Gonzalez meets this step as well, he will be allowed to proceed and the state required to respond.

ALLEGATIONS OF FACT

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). In his complaint,¹ Gonzalez alleges, and the court assumes for purposes of this screening order, the following facts:

- Plaintiff Jorge Gonzalez is an inmate at Wisconsin Secure Program Facility ("WSPF") in Boscobel, Wisconsin.
- Sergeant Kussmaul is a unit sergeant at WSPF. C.O. Barr is a correctional officer at WSPF. Dr. Hoem and Dr. Amarante are psychologists providing services at WSPF.
- Gonzalez alleges that he has been diagnosed with post traumatic stress disorder, depression, anxiety, and hyper-vigilance (paranoia). He has also attempted to commit suicide in the past, which he alleges are well-documented.
- On July 5, 2013, at 6:30 a.m., Sergeant Kussmaul told Gonzalez that he would not be able to call his family on the phone for at least another month.
- Gonzalez told Kussmaul that "this was causing me psychological distress and that I was going to cut my throat due to having my communication with my family taken away." (Compl. (dkt. #1) p.3.) Gonzalez told Officer Barr the same thing.
- At 10:30 a.m., Gonzalez asked Kussmaul why no one had come to talk to him and requested to speak to someone in the psychiatric services unit.
- Dr. Hoem came to Gonzalez's door "agitated." Gonzalez asked why she hadn't come to talk to him and whether Kussmaul had notified her of the situation. Dr. Hoem responded that "she may have had a message on her voicemail but she hadn't got around to it."
- Gonzalez also alleges that Dr. Amarante is responsible for his "psychological torment."

¹ Gonzalez attached various materials, including a cover letter to the court dated September 15, 2013 (dkt. #1-5 at pp.1-2), to the complaint. The court has considered these other materials in setting forth Gonzalez's allegations.

- In the cover letter accompanying the complaint, Gonzalez further contends that he is receiving “no [psychological] treatment whatsoever.” (Dkt. #1-5 at 1.)
- Gonzalez seeks a preliminary and permanent injunction transferring him to an institution better equipped to deal with his mental problem and barring him from returning to WSPF.

MOTIONS FOR LEAVE TO AMEND AND SUPPLEMENTARY MATERIALS

Since filing his complaint, Gonzalez has filed two motions to amend his complaint. In the first motion, Gonzalez seeks in part to add two defendants, Joanne Gavier and Bob Vickery, as well as add a request for damages in the amount of \$1 million dollars. (Dkt. #9.) The court will grant Gonzalez leave to add Vickery as a defendant since the attached materials demonstrate that Vickery may have been involved in denying Gonzalez psychological treatment.² The caption has been changed to reflect this amendment. The court will also grant Gonzalez leave to amend his complaint to request monetary damages. On the other hand, Gonzalez fails to explain who Joanne Gavier is and how his allegations implicate her. Therefore, the court will not grant Gonzalez leave to add her as a defendant.

In that same motion, Gonzalez also seeks to add a claim for failure to protect and retaliation based on a September 29, 2013, incident with another inmate. Gonzalez has filed other documents about that incident as well. (Dkt. ##7, 16.) Because his proposed claims relating to the September 29, 2013, incident, as well as other claims of

² Gonzalez also attached documents to his motion for leave to amend, which include a psychological service request form dated October 24, 2013, requesting medication for his depression. The staff response was signed by Bob Vickery on October 30, 2013, and states “You will not be seen for further psychiatric visits.” (Dkt. #9-1 at p.1.)

retaliation by defendants or other WSPF employees, are unrelated to the two claims set forth in his original filing, the court will not consider or screen these additional claims in this case. If Gonzalez wishes to pursue the claims arising out of the September 29, 2013, incident or other events not directly related to his claims for denial of access to the telephone or deliberate indifference to his psychological needs, he must do so in a separate action.

In a second motion to amend, Gonzalez seeks leave to add a request for a preliminary injunction requiring WSPF to implement ACLU model mental health act. (Dkt. #12.) The court takes up this request in the opinion below to the extent it is material to his pending request for a preliminary injunction requiring treatment of his mental health issues. In all other respects it is unrelated to the claims assert in this case and the court will deny this second motion for leave to amend.

OPINION

I. Screening Order

A. Restrictions on Telephone Calls

Gonzalez's first claim is apparently against Sergeant Kussmaul alone for allegedly restricting his telephone calls in violation of the First Amendment. Unreasonable restrictions on a prisoner's telephone access may violate the First Amendment. *See, e.g., Thornburgh v. Abbott*, 490 U.S. 401 (1989); *Duran v. Elrod*, 542 F.2d 998 (7th Cir. 1976). In determining whether restrictions on a prisoner's right to a telephone violate the First Amendment, this court must weigh the factors articulated by the United States Supreme

Court decision in *Turner v. Safley*, 482 U.S. 78 (1987), including (1) whether there is a “valid, rational connection” between the restriction and a legitimate governmental interest; (2) whether the prisoner retains alternatives for exercising the right; (3) the effect that accommodation of the right will have on prison administration; and (4) whether there are other ways that prison officials can achieve the same goals without encroaching on the right. *Id.* at 89-90.

As the Seventh Circuit explained, district courts should generally wait until summary judgment to determine whether there is a reasonable relationship between a restriction and a legitimate penological interest because an assessment under *Turner* requires a district court to evaluate the prison officials’ particular reasons for the restriction. *See Ortiz v. Downey*, 561 F.3d 664, 669-70 (7th Cir. 2009) (holding that it was error for district court to conclude without evidentiary record that policy was reasonably related to legitimate interest); *Lindell v. Frank*, 377 F.3d 655, 658 (7th Cir. 2004) (same).

At this stage of the proceedings, the court will assume, without deciding in a vacuum, that Kussmaul’s alleged denial of the use of the telephone to contact his family for at least one more month implicates plaintiff’s constitutional rights. If Gonzalez can prove that his constitutional rights have been impinged, defendant will then have to show that the restrictions are reasonably related to a legitimate penological interest.

B. Deliberate Indifference to Mental Health Needs

Gonzalez’s second, apparent Eighth Amendment claim is against (1) defendants Kussmaul, Barr and Hoem for alleged deliberate indifference to his July 5, 2013, threat to

kill himself; and (2) more generally against defendants Amarante, Hoem and Vickery for alleged deliberate indifference to his need for psychological services. The Eighth Amendment prohibits prison officials from showing deliberate indifference to prisoners' serious medical needs or suffering. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). The protections of the Eighth Amendment apply to the mental health needs of prisoners no less than their physical health needs. See, e.g., *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987); *Wellman v. Faulkner*, 715 F.2d 269, 272 (7th Cir. 1983). To state a deliberate indifference claim, however, a plaintiff must allege facts from which it may be inferred that he had a serious medical need and that prison officials were deliberately indifferent to that need. *Gutierrez v. Peters*, 111 F.3d 1364, 1369 (7th Cir. 1997).

“Serious medical needs” include (1) conditions that are life-threatening or that carry risk of permanent serious impairment if left untreated; (2) those in which the deliberately indifferent withholding of medical care results in needless pain and suffering; or (3) conditions that have been “diagnosed by a physician as mandating treatment.” *Gutierrez*, 111 F.3d at 1371-73. A prison official has acted with deliberate indifference when the official “knew of a substantial risk of harm to the inmate and acted or failed to act in disregard of that risk.” *Norfleet v. Webster*, 439 F.3d 392, 396 (7th Cir. 2006) (citing *Walker v. Benjamin*, 293 F.3d 1030, 1037 (7th Cir. 2002)).

Here, Gonzalez alleges that (1) he suffers from post-traumatic stress disorder, depression, anxiety, and hyper-vigilance (paranoia), and (2) has attempted to commit suicide in the past. These allegations are sufficient to constitute a serious medical need. Specific to the July 5, 2013, incident, Gonzalez alleges that he told Sergeant Kussmaul

and Officer Barr that he was going to kill himself and that neither responded by timely contacting the psychiatric services unit. Specific to this July 5, 2013, incident, Gonzalez alleges that Dr. Hoem visited him following his threat, but her response was one of deliberate indifference. Finally, Gonzalez complains generally about deliberate indifference to his psychological or mental health needs at WSPF, alleging that Dr. Amarante deliberately ignored his responsibilities for his mental health care and, the court infers from Gonzalez's submission, that Dr. Hoem and Bob Vickery also deliberately ignored their own treatment obligations.

While the court finds that Gonzalez has alleged sufficient facts to state an Eighth Amendment claim against all of these defendants under the court's lower standard for screening, Gonzalez should be aware that to be *successful* on his claim, or even get past a motion for summary judgment, he will have to *prove* defendants' deliberate indifference, which is a high standard. Inadvertent error, negligence or gross negligence are insufficient grounds for invoking the Eighth Amendment. *Vance v. Peters*, 97 F.3d 987, 992 (7th Cir. 1996). In particular, it will be Gonzalez's burden to prove: (1) his medical condition constituted a serious medical need, which may well require expert testimony rebutting medical evidence to the contrary; and (2) perhaps even more daunting, that each individual defendant knew Gonzalez's condition was serious, had responsibilities to provide for and deliberately ignored his mental health needs.

II. Motion for Preliminary Injunction

In a declaration filed on November 4, 2013, Gonzalez seeks a preliminary injunction requiring adequate mental health care in light of his serious risk of suicide. (Dkt. #8.) In light of Gonzalez's repeated statements in his submission that he is suicidal, coupled with the October 31, 2013, note signed by Bob Vickery indicating that Gonzalez will not be seen for further psychiatric services (dkt. #9-1 at p.1), the court will require defendants to respond to plaintiff's motion for preliminary injunction at the same time their answer to the complaint is due.

III. Motion for Assistance in Recruitment of Counsel

Finally, Gonzalez seeks assistance in recruiting counsel. (Dkt. #10.) In deciding whether to enlist counsel, the court must first find that a plaintiff has made reasonable efforts to find a lawyer on his own and has been unsuccessful or that he has been prevented from making such an effort. *Jackson v. County of McLean*, 953 F.2d 1070, 1072-73 (7th Cir. 1992). To prove that he has made a reasonable effort to find a lawyer, a plaintiff must normally give the court the names and addresses of at least three lawyers that he asked to represent him on the issues on which he has been allowed to proceed and who turned him down. Gonzalez has met this requirement, attaching four letters from attorneys who declined to represent him in this action. (Dkt. #10.)

The next question is whether Gonzalez meets the legal standard for appointment of counsel, in the sense that the legal and factual difficulty of the case exceeds his ability to prosecute it. *Pruitt v. Mote*, 503 F.3d 647, 654, 655 (7th Cir. 2007). In making this

determination, the court must consider the “litigant’s demonstrated ability -- or inability -- to meet th[e] demands” of litigation. *Id.* at 663. To date, Gonzalez has submitted numerous documents, most of which are lucid and well-written. Accordingly, the court finds Gonzalez has not, at least at this time, met his burden of showing that this is one of the extraordinary times where recruitment of counsel is necessary even in the early stages of the case. His motion will, however, be denied without prejudice, subject to reconsideration when the disputed issues in this case become more distinct and/or plaintiff’s limitations as an advocate starkly present themselves.

ORDER

IT IS ORDERED that:

- 1) Plaintiff Jorge Gonzalez’s request to proceed against defendant Sergeant Kussmaul on First Amendment denial of telephone use is GRANTED.
- 2) Plaintiff’s request to proceed on his Eighth Amendment deliberate indifference claim against defendants Kussmaul, Barr, Hoem, Amarante and Vickery is GRANTED.
- 3) Plaintiff’s request for a preliminary injunction (dkt. #8) is RESERVED. Defendants shall file a response to this motion on the same date as their answer to the complaint is due.
- 4) Plaintiff’s motion for leave to file amended complaint (dkt. #9) is GRANTED IN PART AND DENIED IN PART. Plaintiff is granted leave to add Bob Vickery and a claim for monetary damages. In all other respects, plaintiff’s motion is denied.
- 5) Plaintiff’s motion for assistance in recruiting counsel (dkt. #10) is DENIED without prejudice.
- 6) Plaintiff’s motion for leave to file an amended complaint (dkt. #12) is DENIED.

- 7) For the time being, plaintiff must send defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendants or to defendants' attorney.
- 8) Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.
- 9) Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendants.
- 10) Plaintiff is obligated to pay the balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the warden at his institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

Entered this 20th day of December, 2013.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge